Supreme Court of the United States

OCTOBER TERM, 1951.

No. 25.

SUTPHEN ESTATES, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANT.

H. G. PICKERING,
40 Wall Street,
New York, N. Y.
Counsel for Appellant.

MUDGE, STERN, WILLIAMS & TUCKER,
BERTRAM F. SHIPMAN,
MILTON BLACK,
LEONARD GARMENT,
Of Counsel.

Pandick Press, Inc., 73 Thames St., New York 6, N. Y., U. S. A.

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BRIEF OF APPELLANT.

Opinion Below.

No opinions were delivered by the court below in connection with the judgment and order appealed from.

Grounds of Jurisdiction of this Court.

This is a direct appeal from a final judgment (R. 8-31) and from an order (R. 31-2) denying Appellant's application for intervention in this action.

The action was brought by the United States against the principal motion picture producers, distributors and exhibitors charging them with violations of Sections 1 and 2 of the Sherman Antitrust Act. It was tried by a three-judge court pursuant to the Expediting Act of February 11, 1903, as amended (15 U. S. C., Sec. 28).

The cause as against the so-called Warner defendants, i.e., Warner Bros. Pictures, Inc. (hereinafter called Warner), Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation, was terminated with a Consent Judgment on January 4, 1951 and severed (R. 223-4). The judgment was consented to by the Warner defendants and was entered after a hearing on Appellant's motion for leave to intervene, and its denial.

Statutory Provisions Conferring Jurisdiction.

Jurisdiction of this Court of this direct appeal is conferred by Section 2 of the Expediting Act (15 U. S. C. Sec. 29), which provides:

> "In every civil action brought in any district court of the United States under any of said Acts, [including sections 1 and 2 of the Sherman Antitrust Act] wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

and Title 28 (U. S. C. Sec. 2101), which provides in part:

> "(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

Exclusive jurisdiction of this Court of this appeal is established by *United States* v. *California Canneries*, 279 U. S. 553, 557-560 (1929) in which a decision of the Court of Appeals of the District of Columbia on an appeal from an order denying intervention in an antitrust suit brought by the United States was reversed on the ground that the Court of Appeals was without jurisdiction since under the

Expediting Act an appeal lies only to this Court from the final judgment in such an action.

The Appeal Was In Time.

The Consent Judgment was signed January 4, 1951 and entered January 5, 1951. (R. 8-31) Appellant's intervention, denied orally on January 4, 1951 (R. 221, fol. 208-27) was denied by formal order made and entered February 26, 1951. (R. 31-32) The petition for appeal herein (R. 119-120) was filed March 2, 1951 and was allowed on the same day. (R. 122)

Intervention Was Claimed As Of Right and the Judgment and Order Denying Such Claim Are Appealable.

Appellant's right to intervene was asserted under clauses 2 and 3 of Rule 24(a) of the Federal Rules of Civil Procedure which are as follows:

> "(a) *Intervention of right.* Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

and also under Rule 24(b), the pertinent provisions of which are as follows:

> "(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law

> or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

This Court recently considered the appealability of denials of applications for intervention under Rule 24(a) which provides for intervention as of right and under Rule 24(b) which relates to permissive intervention and said:

> "Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it." *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co., et al.*, 331 U. S. 519, 524-525 (1947).

Affirmances by this Court of orders denying intervention in relation to the final decree as to all defendants in this cause (*U. S.* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131, 178 (1948)) and in relation to the final consent judgment as to the Paramount defendants (*Ball, Trustee* v. *U. S.*, 338 U. S. 802 (1949), and *Partmar Corporation* v. *U. S.*, 338 U. S. 804 (1949)) are direct precedents establishing jurisdiction of this appeal. [The inappositeness of these decisions as precedents for the denial of Appellant's application to intervene is shown at pages 14-16 of Appellant's brief herein in opposition to the motion of the Government to affirm and the motion of Warner to dismiss.]

In *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137, 142 (1944) this Court dismissed an appeal from an order denying intervention in an antitrust action brought by the United

States on the ground that it was but an order and not the final judgment. It was noted, however, that a final decree had been entered in the cause prior to the allowing of the appeal and this Court said:

> "* * * if we treat the appeal as taken from that final decree, as we think is required by the Expediting Act, and as attacking that decree because the appellant had been wrongfully denied intervention, we should have to affirm the judgment * * *" (322 U. S., at p. 142).

The Consent Judgment appealed from is the "final decree" in this cause as to the Warner defendants and it and the order appealed from are attacked because Appellant has been wrongfully denied intervention.

The jurisdiction of this Court would seem to be clear and is tacitly conceded by the Government which moved not to dismiss but to affirm.

That substantial questions are involved will be shown in the argument herein on the merits.

Statement of the Case.

The Issue.

Appellant leased a theatre property to one of Warner's sub-subsidiaries in 1928 for a term of 98 years at a minimum rental of $300,000 per annum. The present unexpired term of the lease is 75 years. The tenant's obligations under the lease are guaranteed by Warner.

Under the Consent Judgment Warner is to be dissolved after transferring all of its theatre assets to a New Theatre Company and all of its production and distribution assets to a New Picture Company and the issue by said companies of their capital stock directly to stockholders of Warner.

Appellant thus loses the Warner guaranty. It was to protect its rights in respect of the guaranty that Appellant sought to intervene.

History of the Action.

This action was commenced by the United States in 1938 against the principal motion picture companies, including the Warner defendants, who were charged in the complaint with violations of Sections 1 and 2 of the Sherman Anti-trust Act. A decree adjudicating that the Sherman Act had been violated was entered (*U. S.* v. *Paramount Pictures, Inc., et al.*, 70 F. Supp. 53). All parties appealed. The decree was affirmed by this Court, but the cause was remanded for further consideration by the trial court of the questions of divorcement of theatre holdings by the distributor defendants and of divestiture by the theatre holding companies of theatres which might be the illegal fruits of their antitrust violations: *U. S.* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131 (1948).

After further proceedings in the court below a decree was entered on February 8, 1950 (R. 1-8)* which required each of the major defendants** (including the Warner defendants) to submit a plan for the ultimate separation of its distribution and production business from its exhibition business. It also provided for the submission of plans for the divestiture of theatre interests in compliance with the decision of this Court. On appeals by the Government and defendants that decree was affirmed by this Court. *Loew's Inc., et al.* v. *United States*, 339 U. S. 974 (1950).

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* There are also included in the record the opinion of the Court below (R. 42-74B), (85 F. Supp. 881) which preceded said final decree of February 8, 1950, and the findings of fact and conclusions of law (R. 75-117) filed with it.

** Except RKO defendants and Paramount defendants, against whom consent decrees had theretofore been entered.

Consent Judgment Against Warner Defendants.

Instead of following the procedure prescribed in the aforesaid decree with respect to plans of divorcement and divestiture, the Government and the Warner defendants worked out between them the Consent Judgment (R. 8-31) from which Appellant has appealed. By its terms it superseded the prior decrees and is the final judgment in the action with respect to the Warner defendants. (R. 9, Sec. I)

The Consent Judgment (R. 25, Sec. VI, A) required Warner to present to its stockholders within 90 days a plan of reorganization to effect divorcement of its theatre assets located in the United States from its production and distribution assets. The plan of reorganization, it was required, should provide: (a) that all of said theatre assets should be transferred and assigned to a New Theatre Company; (b) that all of said production and distribution assets should be transferred and assigned to a New Picture Company; (c) that the New Theatre Company and the New Picture Company should each distribute its common stock pro rata to stockholders of Warner in exchange for the assets received by it; and (d) that Warner should thereupon be dissolved.

The Consent Judgment also required Warner defendants unconditionally to divest themselves of some 50 theatres, and to divest themselves of numerous other theatres upon conditions stated in the decree. (R. 13-25, Sec. V, 1-8).

The concluding paragraph of the Consent Judgment is as follows:

> "Jurisdiction of this cause is retained for the purpose of enabling any of the parties and their successors to this consent judgment, and no others, to apply to the Court at any time for such orders or direction as may be necessary or appropriate for

the construction, modification or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief." (R. 30, Sec. XI, B)

Appellant's Situation and Its Application to Intervene.

Appellant is the landlord of the very valuable property on which is located the Strand Theatre at Broadway and 47th Street in New York City. The Tenant is Stanley Mark Strand Corporation. All of the obligations of the Tenant under the lease* are unconditionally guaranteed by Warner which owns approximately 99% of the capital stock of Stanley Company of America, which owns all of the capital stock of the Tenant. The lease is for a term of 98 years beginning January 1, 1929 and ending December 31, 2026. It provides for an annual rental until the end of 1952 at the rate of $300,000 per annum. Thereafter and for successive periods of 21, 21, 21 and 11 years, respectively, the annual cash rental is to be 5% of the appraised value of the land or the annual rental payable during the last year of the preceding period, whichever is greater. In addition the Tenant is obligated to pay taxes, water rates, assessments, insurance and other charges. The lease provides for the alteration and improvement of the present buildings on the premises by the Tenant at an estimated cost of $1,000,000 and requires the Tenant to pay to Appellant as security against its default in respect of such obligation the sum of $100,000 per annum beginning December 15, 1948 until $1,000,000 has been so deposited. Three such payments have been made, the last on December 15, 1950. (R. 33-34, par. 2; 36, 37, 38, par. 2, 3, 6, 7)

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* The lease has been amended several times (R. 37-38, par. 5-6) in respects not here material, and as used herein the lease means the lease as amended.

The minimum cash obligations of the Tenant to Appellant under the lease during the remaining 75 years of the term are in excess of $23,000,000, exclusive of taxes, water, assessments, insurance and other charges which the Tenant is obligated to pay. All obligations of the Tenant under the lease are, as above stated, unconditionally guaranteed by Warner.

The Strand Theatre covered by the lease is not among those of which Warner is required to divest itself by the Consent Judgment appealed from. Neither the lease nor the guaranty was condemned by, and neither was mentioned in, that judgment. The lease, therefore, is to continue as a valid agreement between Appellant and Tenant for the remaining 75 years of the term. However, Appellant is to be deprived of the security for the lease, namely, Warner's guaranty of performance of all obligations of the Tenant under the lease. This results from the requirement of the Consent Judgment that all assets of Warner be transferred to two new companies, that all of their common stock issued in exchange therefor be distributed by them pro rata to the stockholders of Warner, which shall thereupon be dissolved. (R. 25, Sec. VI, A)

Learning of the hearing on the proposed Consent Judgment, Appellant sought to intervene to have the court preserve its rights under the Warner guaranty or provide an equivalent substitute. Its application to intervene was brought on for hearing by order to show cause (R. 32-3) applied for in order that it would be heard when the Consent Judgment was presented to the court. (R. 33, 35, par. 6) Appellant's application was supported by an affidavit (R. 33-36) of its counsel and by a proposed pleading in intervention (R. 36-41) setting forth its claim.

After alleging the facts with respect to the lease and Warner's guaranty of all obligations of the Tenant there-

under and the Consent Judgment and the proposed reorganization of Warner provided for therein (R. 36-39, par. 2-8), Appellant alleged that the proposed plan of reorganization would destroy and deprive Appellant of its rights in, to and under the guaranty "which is a valid, subsisting obligation, unrelated to any antitrust violations by Warner or any other defendant". (R. 39, par. 9).

It was averred that such destruction was unnecessary to full compliance by the Warner defendants with the decree of the court of February 8, 1950 (*supra*, p. 6, R. 1-8), that said decree afforded to Warner wide latitude in formulating a plan to comply with its divorcement provisions and that the plan provided for in the Consent Judgment was selected by Warner as most advantageous economically or otherwise to Warner's stockholders. (R. 39, par. 9 and 10)

It was alleged that the proposed Consent Judgment, although providing for the transfer by Warner of all of its assets and for its dissolution, contained no provision for the preservation or protection of Appellant's rights in respect of the Warner guaranty, or for an equivalent substitute therefor and that no such provision was or would be made in or in connection with the plan of reorganization or the transfer of the assets of Warner or its dissolution. (R. 39-40, par. 11)

It was averred that unless the Consent Judgment or other order in the cause and/or the plan of reorganization provided for such preservation or protection or equivalent substitute, valuable rights of Appellant would be destroyed to its immediate, great and irreparable damage and Appellant would be deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. (R. 40, par. 12)

Appellant asserted its right to intervene as of right and also its right to permissive intervention under Rule

24 of the Federal Rules of Civil Procedure, *supra*, p. 3. (R. 40, par. 13, 14)

Appellant alleged it had no adequate remedy except by intervention in the action (R. 40-41, par. 15), and prayed that it be permitted to intervene and that either (a) the court refrain from signing the Consent Judgment until it and the Warner plan of reorganization were amended to assure preservation of Warner's guaranty obligations or to provide a fully equivalent substitute therefor which should include an assumption of such obligations jointly and severally by the two new transferee corporations, or (b) such preservation or equivalent substitute be provided for by a separate order, and that Appellant have such other, further and different relief as might be just, equitable and proper. (R. 41)

Appellant's application to intervene was heard by the court below on January 4, 1951 immediately following the presentation of the Consent Judgment and was denied and Appellant's request that the denial be without prejudice was also denied. (R. 221, fol. 208-27) The Consent Judgment was thereupon signed (R. 222-3, fol. 208-30) and a formal order denying Appellant's application was made on February 26, 1951. (R. 31-32)

The plan of reorganization prescribed in the Consent Judgment was submitted to Warner stockholders and approved by them at a meeting held February 20, 1951. (R. 224) The plan as set forth in the proxy statement mailed to stockholders, copies of which are of record in the office of the Securities and Exchange Commission* did not (as Appellant had alleged it would not) preserve or protect or provide an equivalent substitute for the Warner guaranty. After enumerating certain obligations to be assumed by the New Theatre Company and the New Picture Com-

* Warner Statement Opposing Jurisdiction, p. 4.

pany, respectively, but not including the Warner guaranty of Appellant's lease, the plan as set forth in the proxy statement contains the following (p. 6):

> "The New Theatre Company will assume all other liabilities and obligations of Warner [Warner Bros. Pictures, Inc.] relating to the assets transferred to it without regard to the date such liabilities and obligations were incurred. The remaining liabilities and obligations of Warner will be assumed by the New Picture Company.
>
> "Holders of contracts with and guarantees by Warner may claim that both of the New Companies are liable on such obligations, and one such claim has been made. The validity and the amount of claims which may be made against the New Company which does not assume such obligations is indeterminable.
>
> "For all purposes under this Plan, the determination by Warner of the allocation to each of the New Companies of liabilities and obligations shall be final and conclusive."

The stockholders were also advised that rulings had been procured from the Commissioner of Internal Revenue, to be confirmed by closing agreements with the Treasury Department, to the effect that the reorganization would be a "reorganization" within the meaning of Section 112(g)(1) of the Internal Revenue Code and would be tax-free to the two new companies and to the stockholders of Warner. (id. p. 6)

Specifications of Errors.

The assignments of error (R. 120-121) which Appellant urges are summarized as follows:

The court below erred in denying intervention claimed as of right under Rule 24(a) of the Federal Rules of Civil

Procedure; in denying intervention claimed under the permissive provisions of Rule 24(b) of said Rules, and such denial was an abuse of discretion; in failing to provide for the preservation of the rights and property of Appellant in respect of the Warner guaranty; in failing to provide an equivalent substitute for said guaranty; and in declining to hold that the Consent Judgment and the denial of intervention will deprive Appellant of property without due process of law in violation of the due process clause of the Fifth Amendment of the Constitution of the United States.

Summary of Argument.

I. Appellant was entitled as of right to intervene in the action to assert its claim.

A. The representation of Appellant's interest by existing parties was inadequate and Appellant is bound by the Consent Judgment.

1. Representation of Appellant's interest by the existing parties was inadequate.

2. Appellant is or may be bound by the Consent Judgment.

B. Appellant is so situated as to be adversely affected by a distribution or disposition of property which is in the custody or subject to the control or disposition of the Court.

II. Appellant was entitled to permissive intervention and the denial thereof was an abuse of discretion.

A. Appellant's claim and the main action in respect of the Consent Judgment had a question of law or fact in common.

B. Appellant's intervention would not have unduly delayed or prejudiced the adjudication of the rights of the original parties.

C. The denial of Appellant's application to intervene was an abuse of discretion.

III. Appellant has no adequate remedy except by intervention.

IV. Appellant is entitled to a judicially ascertained equivalent substitute for the Warner guaranty.

V. The Consent Judgment and the denial of intervention will deprive Appellant of property without due process of law.

ARGUMENT.

Appellant repeats* that the sole purpose of its intervention was to have the court award it relief in respect of the Warner guaranty whose destruction was being brought about. It did not seek to delay the making of the Consent Judgment. It did not and does not seek in any manner to interfere with or obstruct the distribution of the property of Warner or its dissolution as required by the Consent Judgment. It did not and does not question the propriety of, or seek in any manner to have modified, the remedies imposed by the Consent Judgment. Appellant's contention was and is that it is entitled to have the court below in this cause ascertain and order an equivalent substitute for the guaranty of Warner. The substitute prayed for is the guaranty of both new companies to which the Consent Judgment requires all of the property of Warner to be transferred.

In the following argument it will be shown that Appellant was entitled as of right to intervene, that the denial of Appellant's application for intervention was an abuse of discretion, that Appellant has no adequate remedy except by intervention, and that the relief prayed is appropriate and should be awarded as a matter of justice and equity.

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* Appellant's brief in opposition to motions, pp. 6-7.

I.

Appellant was entitled as of right to intervene in the action to assert its claim.

Appellant's attempted intervention was "upon timely application." Rule 24(a), Federal Rules of Civil Procedure, *supra*, p. 3.

Until the formulation and presentation to the court of the Consent Judgment appealed from, Appellant had no reason to seek the aid of the court for the protection of its rights with respect to the Warner guaranty. The decree of February 8, 1950 (R. 1-8) required the submission by Warner of "a plan for the ultimate separation of its distribution and production business from its exhibition business". (R. 5, Sec. IV, par. 1) That decree did not require the transfer of all assets of Warner to newly organized corporations and the dissolution of Warner. It was the plan selected by the Warner defendants and agreed to by the Government and incorporated in the proposed Consent Judgment which for the first time placed the Warner guaranty in jeopardy. Appellant moved promptly on learning of the hearing on the proposed Consent Judgment and brought on its application for intervention to be heard at the same hearing and before the making and entry of the Consent Judgment.

A.

The representation of Appellant's interest by existing parties was inadequate and Appellant is bound by the Consent Judgment.

Clause (2) of Rule 24(a) of the Federal Rules of Civil Procedure provides for intervention of right "when the representation of the applicant's interest by existing par-

ties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

1. Representation of Appellant's interest by the existing parties was inadequate.

The primary function of the Department of Justice in an antitrust action is to represent the public interest. Nevertheless, as the agency of the Government charged with the enforcement of the antitrust laws it, as well as the court, is under the duty to have proper regard for the interests of innocent third parties in the formulation of decrees against violators of those laws. *Standard Oil Company of New Jersey* v. *U. S.*, 221 U. S. 1, 77-78 (1911); *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 185 (1911); *U. S.* v. *Union Pacific Railroad Co.*, 226 U. S. 470, 477 (1913).

> "* * * one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." (*Standard Oil* case, *supra*, at p. 78)

To whatever extent the Government may be charged with any duty of representing Appellant, its representation was in fact inadequate. It opposed the intervention.

Warner clearly had a duty to represent, and did represent the interests of its stockholders. In connection with the Consent Judgment and the plan of reorganization required by its provisions, it also had a duty to represent creditors. That its representation of Appellant as a contingent creditor was inadequate is readily shown.

(a) It opposed Appellant's intervention.

(b) The interests of the stockholders represented by Warner were adverse to Appellant's interests. The plan of reorganization incorporated in the Consent Judgment which eliminated Warner's guaranty of the lease was not required by the decree of February 8, 1950, which was

affirmed by this Court. It was a plan selected by Warner from among others under which Warner's guaranty would have continued, because it would not result in tax liability for Warner stockholders, whose interests were paramount with Warner. Warner's representation of the adverse interest of stockholders, to which Appellant's interest was subordinated, without more, establishes that its representation of Appellant was inadequate under Rule 24(a)(2). *Mack* v. *Passaic National Bank & Trust Co.*, 150 F. (2d) 474 (C. A. 3rd, 1945); *International Brotherhood of Teamsters* v. *Keystone Freight Lines*, 123 F. (2d) 326 (C. A. 10th, 1941).

(c) The right of Appellant to enforce the Warner guaranty against both the New Picture Company and the New Theatre Company or to follow the assets into their hands (see *infra*, p. 25) has been challenged because, it is claimed, any such liability on the part of the New Picture Company in respect of a theatre lease would be inconsistent with the purpose of the Consent Judgment to separate Warner's business of exhibition from its production and distribution interests. (R. 220, fol. 208-25) Warner's representation of Appellant's interest was inadequate in failing to safeguard such right or to provide an equivalent substitute therefor. Omission to act has been held sufficient to show inadequacy of representation for purposes of Rule 24(a)(2). *Wolpe* v. *Poretsky*, 144 F. (2d) 505 (C. A., D. C. 1944).

Manifestly, Warner's representation of Appellant with respect to remedies was inadequate.

2. Appellant is or may be bound by the Consent Judgment.

The binding effect of the Consent Judgment on Appellant with respect to its contract with Warner is obvious and unavoidable.

Appellant's rights under the guaranty as against Warner will be destroyed as effectively as though they were expressly dealt with in the Consent Judgment. The reorganization plan will be consummated. The two new companies will be organized. Warner's assets will be transferred to them. Warner will thereafter be dissolved. All of this will be done pursuant to, and if necessary by enforcement of, the Consent Judgment.

Under a subsequent discussion of the lack of any adequate remedy except intervention (*infra*, p. 25) we deal with the futility of the pursuit of Warner's assets in the event of a default years hence. But even in that connection, the statement of Government counsel on the hearing below that it was unalterably opposed to placing the New Picture Company (the recipient of Warner's production and distribution assets) in the position of a guarantor of a theatre (R. 220, fol. 208-25), is advance notice of the Government's position that an attempt to follow those assets would be contrary to the provisions of the Consent Judgment. Certainly the Government intends that Appellant shall be bound.

It is enough under Rule 24(a)(2) that Appellant will be indirectly bound or that its rights will be substantially affected by the Consent Judgment. *Mack* v. *Passaic National Bank & Trust Co.*, 150 F. (2d) 474 (C. A. 3rd, 1945), *supra*, p. 17; *White* v. *Douds*, 80 F. Supp. 402 (S. D. N. Y. 1948).

B.

Appellant is so situated as to be adversely affected by a distribution or disposition of property which is in the custody or subject to the control or disposition of the Court.

Clause (3) of Rule 24(a) of the Federal Rules of Civil Procedure provides for intervention as of right "when the applicant is so situated as to be adversely affected by a dis-

tribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or an officer thereof".

Manifestly Appellant will be adversely affected by the disposition and distribution of the assets of Warner and of the shares of stock to be issued by the new companies to Warner stockholders in exchange for such assets. Instead of having an enforceable guaranty of Warner backed up by all of its assets, which Appellant confidently relied upon as ample security for the lease obligations, Appellant finds that Warner, the guarantor, is shortly to be without any assets and soon thereafter will cease to exist. And Appellant is warned by the Government that any effort by Appellant to assert any claim under the guaranty against the assets transferred to the New Picture Company will be opposed because the recognition of such claim would be in conflict with the provisions of the Consent Judgment.

It would seem equally clear that the property, the distribution and disposition of which adversely affects Appellant, was "subject to the control or disposition of the court". It is noteworthy that this clause in Rule 24(a) as originally adopted by this Court related in terms only to property "in the custody of the court" and that the words "or subject to the control or disposition" were added ten years later by amendment. This circumstance adds emphasis to the words supplied by the amendment. Certainly the court below directed the disposition of the Warner assets and the stock of the new companies by its prescription of the plan of reorganization in the Consent Judgment and Warner by its consent thereto subjected all of its assets to the disposition of the court. The requirements as to the plan were specific: (a) that all Warner theatre assets should be transferred and assigned to the New Theatre Company; (b) that all Warner production and distribution assets

should be transferred and assigned to the New Picture Company; (c) that the two new companies should distribute their common stock pro rata to the stockholders of Warner in exchange for the assets so received; and (d) that thereupon Warner should be dissolved. (R. 25, Sec. VI, A)

The provisions of the Consent Judgment with respect to the distribution and disposition of the assets of Warner and the stock of the new companies are no less effective and evidence no less authority of the court in respect of such distribution and disposition than would be the case had the court taken the assets and stock into its custody through a trustee appointed for the purpose of carrying out its mandate. The court fixed a time limit of 27 months within which these provisions must be complied with and retained jurisdiction of the cause for the purpose, among others, of carrying out and enforcing compliance with, and punishing violations of, its judgment. (R. 8, Sec. IX)

II.

Appellant was entitled to permissive intervention and the denial thereof was an abuse of discretion.

Appellant claimed the right to intervene under the permissive provisions of Rule 24(b) of the Federal Rules of Civil Procedure as well as of right under Rule 24(a). Appellant contends that the court below erred in denying such claim and that such denial was a plain abuse of discretion reviewable by this Court.

Rule 24(b) of the Federal Rules of Civil Procedure, in so far as material, provides:

> "(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim

or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

A.

Appellant's claim and the main action in respect of the Consent Judgment had a question of law or fact in common.

Appellant's complaint was that the Consent Judgment, while in effect decreeing the destruction of Appellant's rights under the Warner guaranty, made no provision for a substitute therefor. Appellant's prayer was that in the Consent Judgment or by separate order the court should grant relief to Appellant in respect of the guaranty by ascertaining and awarding an equivalent substitute therefor, or such other relief as the court might deem just and proper. Appellant contended that it was the duty of the court which was bringing about the destruction of its guaranty security to provide for a substitute therefor. Appellees opposed this contention and the court in denying intervention disclaimed any responsibility for the resulting injury to Appellant. Whatever justification there may be in framing a decree in a Government antitrust action for ignoring the possibility that its provisions may grievously and irreparably affect property rights of innocent parties, it is submitted that when a situation such as that of Appellant is brought to the attention of the parties and the court before the decree is signed, there is a duty to deal with it and grant relief either in the decree or by separate order. That issue was presented by Appellant and was common to its claim and the main action in respect of the final action therein, namely, the signing of the Consent Judgment.

B.

Appellant's intervention would not have unduly delayed or prejudiced the adjudication of the rights of the original parties.

On the hearing in the court below it was made clear that Appellant had no desire to disturb or delay the making of the Consent Judgment. Counsel for Appellant stated, "We do not think it is necessary, and I want to say at the outset that we do not think it is necessary to disturb this decree which you are about to enter:" (R. 218, fol. 208-21) Again he stated, "The Government is wrong in thinking that we are opposing dissolution. I don't think we would be in a position to oppose dissolution on the signing of this decree. That is not our position." (R. 222, fol. 208-29)

That Appellant was not seeking to delay the signing and entry of the Consent Judgment, is also shown by its counsel's suggestion at the hearing that its motion to intervene be adjourned for three or four weeks. (R. 218, fol. 208-22, 23)

C.

The denial of Appellant's application to intervene was an abuse of discretion.

The court below, by the provisions of the Consent Judgment about to be entered, was depriving Appellant of its guaranty held as security for the Tenant's obligations under a lease which had 75 years to run with minimum cash rentals of $300,000 per annum aggregating (with required security deposits) upwards of $23,000,000. We will show (*infra*, pp. 25-27) that Appellant had no adequate remedy except by intervention in the action in which the Consent Judgment was being entered.

It was suggested that if Appellant's intervention were allowed it would open the door to all kinds of claims under

leases, employee's contracts, etc. (R. 221, 222, fol. 208-28, 29) In the case of such contracts, however, a very different situation is presented. Usually a novation can be agreed upon by the parties; but if not, the employee, lessor, lessee or other contractor will have an immediate remedy against Warner. In the case of Appellant on the other hand, no cause of action on the Warner guaranty will arise until there is a default under the lease, which may occur many years after Warner's dissolution.

It was also suggested at the hearing that Warner had other situations similar to Appellant's and that the allowance of Appellant's intervention "would merely be an invitation for other persons to come in". (R. 220, fol. 208-25-26) Whether there are other comparable situations Appellant does not know. Its counsel was advised there were none in Paramount and RKO and was not advised that there was any other such situation in Warner. (See Appellant's brief in opposition to the motions of the Government and Warner, pp. 13-14) However, the possibility or fact (if it be the fact) that there may be others should not deprive Appellant of its right to intervene. Appellant asserted its right. Others did not.

Appellant suggests that the denial of its application may be explained by the attitude generally of the court below with respect to intervention in Government antitrust cases as evidenced by the statement of one of the judges "And I told the applicant* that I had no idea we would grant any intervention. We never have." (R. 220, fol. 208-26)

Rule 24 of the Federal Rules of Civil Procedure makes no exception of Government antitrust cases with respect to interventions of right or permissive interventions. In

*On Appellant's presentation of the order to show cause. (R. 32)

U. S. v. *Terminal Railroad Association of St. Louis*, 236 U. S. 194 (1915) over the Government's opposition this Court allowed intervention on the appeal by persons not parties to that antitrust suit who claimed to be adversely affected by the decree which was formulated. This Court said:

> "The challenge by the United States of the right to hear the intervening petitioners is without merit, since even although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree in so far as it might operate prejudicially to their rights." (p. 199)

Among other instances of interventions in antitrust cases are *Continental Insurance Co.* v. *U. S., Reading Co., et al.*, 259 U. S. 156 (1922); and *Missouri-Kansas Pipe Line Co.* v. *U. S.*, 312 U. S. 502 (1941). The final decree in the last cited case expressly reserved to a third party affected by its provisions a right upon proper application to become a party.

The aversion of the court below, and of the Government, to intervention in antitrust cases is understandable where such intervention might interfere with the prosecution of the actions by the Government in the interest of the public. It is not justified in the case of Appellant whose property rights are destroyed with no other adequate remedy available to it now or in the future.

> "* * * The discretion of the chancellor in permitting or refusing intervention is by no means absolute. If the party seeking intervention shows such an interest in the litigation as to involve the protection of valuable rights and is without remedy elsewhere, the court should not refuse leave to intervene. * * *" *California Co-op Canneries* v. *U. S.*, 299 Fed. 908, 913 (C. A., D. C. 1924).

In *U. S.* v. *Radice*, 40 F. (2d) 445 (C. A. 2nd, 1930) the court said:

> "It is true that, where an application for intervention is denied by the chancellor in the exercise of a sound discretion, the order is said to be non-appealable; but, as intimated in the case last cited, [*Credits Commutation Co.* v. *U. S.*, 177 U. S. 311] there may be cases where intervention is so essential to preservation of the petitioner's rights that denial of it is reviewable by appeal."

It is submitted that intervention is essential for the preservation of Appellant's rights, that the denial of its application was an abuse of discretion and is reviewable by this Court on this appeal. See *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co., et al.*, 331 U. S. 519, 524-525 (1947), *supra*, page 4.

III.

Appellant has no adequate remedy except by intervention.

Rights of creditors in the property of a corporation are as a matter of substantive law superior to those of the stockholders and

> "* * * any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of * * * creditors comes within judicial denunciation." *Louisville Trust Co.* v. *Louisville, etc. Ry.*, 174 U. S. 674, 684 (1899).

In some instances the creditor's superior substantive rights can be enforced by following corporate assets into the hands of transferees. *Northern Pacific Railway Company* v. *Boyd*, 228 U. S. 482 (1931). Such remedy, however, is here wholly inadequate, even if the right of Appellant to follow the assets of Warner and to enforce claims

arising out of the guaranty against both new companies were not challenged by the Government, as it has been. (See *supra*, p. 18).

The lease guaranteed by Warner has 75 years yet to run. No claim will arise under the guaranty unless and until there is a default under the lease. Such default might not occur for 20 or 50 or 70 years. The futility of such remedy upon a default under the lease occurring many years hence, with all the changes in assets and ownership which will inevitably occur meanwhile, is at once apparent. Moreover, ordinarily a creditor cannot follow and proceed against transferred assets of a corporation until judgment is obtained against it. *Pierce, et al.* v. *U. S.*, 255 U. S. 398, 403 (1921), citing *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371 (1893). This would be the case whether Appellant desired to follow the physical assets of Warner in the hands of the new companies or the stock of those companies in the hands of Warner's approximately 27,000 stockholders. But such a judgment against Warner could not be obtained years hence in view of the provisions of Section 42 of the General Corporation Law of Delaware,*

* "Sec. 42. Continuation of Corporation After Dissolution for Purposes of Suit, Etc.:—All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock but not for the purpose of continuing the business for which said corporation shall have been established; provided, however, that with respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to such expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of such expiration or dissolution, such corporation shall only for the purpose of such actions, suits or proceedings so begun or commenced be continued bodies corporate beyond said three-year period and until any judgments, orders, or decrees therein shall be fully executed."

under which Warner is incorporated, limiting the continuance of a corporation to a period of only three years after its dissolution for the purpose of suing and being sued.

It was suggested in the court below that Appellant would have its remedy in the dissolution proceedings of Warner. (R. 221, fols. 208-27) But there will be no court proceedings. Dissolution can be, and generally is, effected by corporate action alone. Moreover, any such action will take place after the transfers of assets to the new companies and the distribution of their stock to the stockholders of Warner. Nor is there any assurance that any court would then have or be able to obtain jurisdiction over the necessary parties, including the two transferee corporations, so as to adjudicate Appellant's rights as against them in respect of the Warner guaranty.

Only in the court below by intervention can adequate relief be awarded to Appellant in respect of the Warner guaranty. The court below unquestionably can properly adjudicate Appellant's claim. It has jurisdiction over Warner and can require it to cause the two new companies to assume its guaranty obligations and to submit themselves to the jurisdiction of the court for the purpose of enforcing such requirement. It is submitted that all of this can and should be done now before the transfer of the Warner assets and their dissipation.

IV.

Appellant is entitled to a judicially ascertained equivalent substitute for the Warner guaranty.

In the prayer for relief in its pleading in intervention, Appellant asked in substance that the court provide a judicially ascertained equivalent substitute for the Warner guaranty, which should include an assumption of the

guaranty jointly and severally by the New Picture Company and the New Theatre Company. (R. 41) The relief prayed is an altogether appropriate means of recognizing and giving effect to the substantive rights of Appellant as a creditor referred to *supra*, page 25.

There is direct precedent in Government antitrust cases supporting Appellant's right to have the court below ascertain and provide an equivalent substitute for the Warner guaranty which the Consent Judgment is destroying.

In *Continental Insurance Company, et al.* v. *United States, Reading Company, et al.*, 259 U. S. 156 (1922), this Court dealt with a plan for dissolving a combination which had been held unlawful in an action brought by the United States under the Antitrust Act and the Commodities Clause of the Interstate Commerce Act. This Court had previously (253 U. S. 26) directed that a combination with the Reading Company of four companies, including a coal company and a railway company, be dissolved so that each of the companies would be independent of the others. The Reading Company and the coal company had jointly given a mortgage covering property of both the coal company and the railway company. In stating the principle to be applied to that situation, this Court quoted "as expressing our view" the following from an unreported opinion* attributed to the Court of Appeals of the Sixth Circuit in a phase of *United States* v. *Lake Shore & M. S. Ry. Co.*, 203 Fed. 295:

> " 'One who takes a mortgage upon several items of property of such character that their common ownership or operation may offend against the Anti-

* This decision, by a three-judge District Court for the Southern District of Ohio, three Circuit Judges sitting, was subsequently reported in 281 Fed. 1007 (1916), the quotation appearing in a footnote at pp. 1012-3.

> Trust Law or the commodities clause, and such that the mortgage serves practically to aid in tying them together, must be deemed to hold his mortgage subject to the contingency that if the complete and final separation of one item of the mortgaged property from the remainder becomes essential to the due enforcement of either named law, the court charged with such enforcement may take control of that item, free it from the consolidating tendency of the mortgage, and substitute therefor its judicially ascertained equivalent.* * *' " (p. 172)

As a substitute for the general mortgage, this Court directed that the Court below determine the values of the properties subject to the lien of the mortgage belonging to the respective companies, that their respective liabilities on the bonds and the liens on their properties be reduced proportionately and that provision be made for separate foreclosures on default. Realizing that this might not provide for the bondholders an equivalent substitute for their security, this Court said:

> "We leave it to the District Court to determine what, if any, injury to the security this modification of the terms of the debt and mortgage may cause and to compensate for it by such a payment to the bondholders by either or both companies as may seem equitable and convenient." (p. 174)

The principle was applied in that case in respect of a mortgage which was condemned by this Court as "the indispensable instrument of the unlawful conspiracy". Concerning the mortgage this Court said:

> "* * * Nevertheless, spread all over the face of the general mortgage, was the information and notice of the union of the railway and coal properties for the very purpose which is the head and front of

the offending under the Anti-Trust Law and which requires this court to dissolve the illegal combination. The general mortgage was the indispensable instrument of the unlawful conspiracy to restrain interstate commerce.* * *'' (p. 172)

If bondholders with such notice of the offending character of their mortgage security were entitled to and received the solicitous care and protection of the court, *a fortiori* should Appellant have received consideration and been awarded relief in respect of its security, the Warner guaranty, which is unrelated to any antitrust violation and which is an accidental casualty of the remedy employed by the court for the Warner defendants' antitrust violations.

V.

The Consent Judgment and the denial of intervention will deprive Appellant of property without due process of law.

The Consent Judgment, entered without notice to Appellant, and the denial of its motion for leave to intervene without opportunity to present its claim and be heard, will deprive Appellant of its property rights in respect of the Warner guaranty without due process of law in violation of the Fifth Amendment to the Constitution of the United States. This is done by action of the court with the active consent of the Government, both of whom disclaim any responsibility whatever to Appellant.

Such disclaimer is sought to be justified on the ground that the guaranty of the New Theatre Company, which it is said is to be provided on dissolution of Warner, should be adequate. The question under the due process clause, however, is not one of possible adequacy of the suggested voluntary substitute for the Warner guaranty, but of full equiv-

alent value judicially ascertained and awarded by the Court as just compensation.

One is not compensated for property taken by having restored half or less than half its value.* It could with as much validity be contended that Appellant will be adequately protected without any security for the obligations under the lease because the tenant is solvent and there is no prospect of its ever defaulting.

Appellant's position is not dissimilar to that of the applicant for intervention in *California Co-op Canneries* v. *U. S.*, 299 Fed. 908 (C. A., D. C. 1924) whose petition to intervene was held to have been improperly denied. Because of its peculiar pertinence, the quotation from the opinion in that case contained in Appellant's Statement as to Jurisdiction** (p. 10) is repeated here.

> "* * * When an equity court, in the exercise of its jurisdiction, makes a decree which, in determining the rights of the parties, enjoins one of them from carrying out a lawful contract with persons not parties to the suit, and gives effect to a cancellation clause of such contract, it is the duty of the court, if it retains jurisdiction of the case, as in this instance, to permit the intervention of the contracting party, who is not a party to the original suit, and who is

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* In an article in the August 13, 1951 issue of "LIFE", page 107, the head of the theatre circuit of one of the defendants in this action is quoted as predicting "that 40% of the country's theatres will close in the next five to seven years." The article continues: "Others, even more pessimistic, have estimated the fatalities at up to 90%." See also reference to the serious and immeasurable impact of television on motion picture theatre attendance and the multitude of antitrust treble damage suits now pending against the motion picture industry, in Appellant's brief in opposition to motions (footnote, pp. 10-11).

** In that Statement this quotation was unaccountably and mistakenly attributed to Mr. Justice Rutledge.

detrimentally affected by the decree, and to give him an opportunity to be heard.

"As we have observed, without intervention appellant would be left remediless. Valuable contract rights have been stricken down, without notice to appellant or an opportunity to be heard. It is a fundamental principle of our jurisprudence that, before private rights may be affected by judicial decree, the party in interest must have due notice and an opportunity to be heard. Upon the strict observance of this principle rests the security of the citizen in the enjoyment of life, liberty, and property; otherwise, these rights could be divested without due process of law." (p. 914.)

CONCLUSION.

The denial by the court below of Appellant's application for intervention should be reversed with instructions to the court below to award to Appellant the judicially ascertained equivalent of the Warner guaranty and otherwise to provide full compensation for the destruction of said guaranty.

Respectfully submitted,

H. G. Pickering,
40 Wall Street,
New York, N. Y.
Counsel for Appellant.

Mudge, Stern, Williams & Tucker,
Bertram F. Shipman,
Milton Tuck,
Leonard Garment,
Of Counsel.